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SUBJECT: UNGA/C-6: THE SIXTH (LEGAL) COMMITTEE DEBATES THE
ANNUAL REPORT OF THE INTERNATIONAL LAW COMMISSION (ILC),
CHAPTERS 1 - 5, AND 12

¶1. Summary: The 63rd UNGA Sixth Committee held part one of a three-part debate on the Report of the International Law Commission (ILC) (A/63/10) October 27-28. Part one's topics included: Chapters 1-3, "Introductory Chapters;" Chapter 4, "Shared Natural Resources;" Chapter 5, "Effects of armed conflicts on treaties;" and Chapter 12, "Other Decisions." Interventions primarily centered on natural resources, transboundary aquifers in particular, and the effects of armed conflicts on treaties. Many speakers supported using the articles on transboundary aquifers as guidelines for bilateral agreements with the possibility of using them later as the basis for an international instrument. Paragraph 10 lists the countries that made interventions. End Summary.

¶2. Part two of the ILC debate included Chapter 6, "Reservations to Treaties;" Chapter 7 "Responsibility of International Organizations;" and Chapter 8, "Expulsion of Aliens" (Septel). Part three's discussion covered Chapter 9, "Protection of persons in the event of disasters;" Chapter 10, "Immunity of State Officials from foreign criminal jurisdiction;" and Chapter 11, "the Obligation to extradite or prosecute (aut dedere aut judicare)" These two parts will be addressed in a separate cable.

PRESENTATION OF CHAPTERS 1-5, 12

¶3. In his introductory statement on Chapters 1-5, and 12, Chairman of the ILC, Edmundo Vargas Correno noted that the ILC has completed, on second reading, a set of 19 draft articles on the law of transboundary aquifers. The text of the articles can be found in paragraphs 53 and 54 of the report (A/63/10). The Chairman also introduced 18 draft articles on Chapter 5, which can be found in paragraphs 65 and 66. He noted that the ILC has included two new topics on its agenda for the next year, "Treaties over time," and "The Most-Favored-Nation Clause."

DEBATING THE FORM OF THE ARTICLES ON
TRANSBOUNDARY AQUIFERS

¶4. Many states welcomed the adoption of the draft articles, but delegates disagreed on the final form the articles should take. USUN stated its position that the articles should be recast as recommendatory, non-binding principles. Canada - noting the bilateral treaties and mechanisms in place between Canada and the United States -- argued that the issue of transboundary aquifers is essentially bilateral. The representative continued that use of the articles for anything more than guidelines for bilateral agreements would be problematic for his delegation. Russia, Australia, Brazil, and Hungary also said that the articles should remain generic principles to guide States in negotiating regional agreements. However, twenty of the countries that spoke supported a two-part approach. First the articles could be appended to a resolution for State use in bilateral or regional arrangements. A legally binding international

instrument could be considered later. Although Italy said that a convention would probably not add any value, its delegate urged the General Assembly to make a decision on the final outcome of the articles in the 63rd session rather than delay it to the indefinite future.

¶5. Delegates had many substantive comments on the articles. Several representatives said that the articles should reflect the principle that States should not cause harm to other aquifer states. Austria held that a joint management mechanism is only one of the possibilities for bilateral or regional cooperation. Norway and Greece believed that the threshold of "significant" harm in articles 6 and 12 was too high. Philippines called for greater clarity on the articles' extension to non-aquifer States. Saudi Arabia argued that the articles should more effectively address banning "directional slant and horizontal drilling." The representative of Saudi Arabia also stated the need for differentiation between desert areas and those rich in groundwater, prioritizing the use of groundwater for drinking.

¶6. On November 14, the Sixth Committee recommended by consensus that the General Assembly adopt a draft resolution on this issue, which (a) encourages States concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers, taking into account the provisions of these draft articles; and (b) includes the transboundary aquifers item on the provisional agenda of its sixty-sixth session - i.e., three years from now - "with a view to examining, inter alia, the question of the form that might be given to the draft articles."

TRANSBOUNDARY OIL AND GAS RESERVES

¶7. Norway, Australia, Russia, Germany and Slovenia agreed that the challenges of managing transboundary gas and oil reserves are quite different from aquifers. These issues require the flexibility of negotiated bilateral agreements, which reflect States' sovereign rights. They thus did not support the ILC engaging in work on this issue. The United States also expressed the view that it would not be productive for the ILC to take up the issue of transboundary oil and gas resources, per Department guidance. Mexico also believed that oil and gas reserves should be considered separately from transboundary aquifers. However, Mexico argued that the issue falls within the potential scope of the ILC's work. In particular, the Mexican representative said that the ILC could usefully study, analyze and compare various unitization arrangements. Australia agreed the ILC could take up gas and oil resources. Poland argued that the scope of the transboundary aquifers might be worth expanding to include other natural resources such as oil and gas.

EFFECTS OF ARMED CONFLICTS ON TREATIES

¶8. The debate highlighted differing opinions on the draft articles' scope regarding the armed conflicts that would affect treaties. Austria and Japan said that the definition of armed conflict in the articles is a circular one, and thus unhelpful. Austria, Russia, Portugal and Italy called for a clarification of the differences between belligerent, non-belligerent and third nations in the way a treaty would be affected in a conflict. For example, Portugal stated that the articles should not include situations where only one party to a treaty was involved in a conflict. According to Department guidance, USUN delivered its position that defining "armed conflict" would likely be counterproductive. Rather, the articles should make clear that armed conflict refers to the set of conflicts covered by articles 2 and 3 of the Geneva Conventions. Belarus and Ghana argued that criteria should be added to the articles about the scope and length of a conflict that would affect a treaty. The

Republic of Korea held that States should have some discretion in suspending treaties. Greece called for the articles to make more extensive reference to doctrine and practice from civil law. Netherlands questioned the practical relevance of the articles altogether.

INCLUDING INTERNAL CONFLICTS IN THE SCOPE -----

¶9. Finland argued that Articles 1 and 3 should apply also to internal armed conflicts. The representative stated that these conflicts affect the operation of treaties as much as international conflicts. Switzerland, Hungary, Poland, and Iran also agreed that internal conflicts should be included in the definition of armed conflicts. However, others supported limiting the definition to international conflicts.

ARE LISTS OF CATEGORIES RELEVANT? -----

¶10. There was no consensus on the usefulness of the proposed comprehensive list of categories of treaties that would be affected by conflicts. Indonesia and Cyprus supported including the list of categories of treaties in an annex. Finland did not support a list of treaties, believing that a case-by-case consideration would be more appropriate. India believed that it would be more helpful to list factors that could lead to the suspension of provisions of a treaty, or lead to a conclusion of a treaty. Israel argued that the list of relevant criteria would suffice. Iran claimed that the ILC did not sufficiently highlight the exceptional status of treaties such as those modifying land and maritime boundaries, which would not change in the event of a conflict. Belarus proposed a discussion of the feasibility of extending the draft articles to include treaties involving international organizations.

LIST OF SPEAKERS -----

¶11. The following countries made interventions: Norway (on behalf of the Nordic Countries - Chapter 4), Finland (on behalf of the Nordic countries - Chapter 5), Argentina, Australia, Austria, Belarus, Brazil, Canada, China, Cyprus, Czech Republic, El Salvador, France, Germany, Ghana, Greece, Hungary, India, Indonesia, Iran, Israel, Italy, Japan, Kenya, Lebanon, Mexico, Malaysia, Netherlands, New Zealand, Nigeria, Philippines, Poland, Portugal, Republic of Korea, Russia, Saudi Arabia, Slovenia, Switzerland, United Kingdom, United States, and Uruguay.

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